ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Amendment of Section 73.622(b),	)	**MM Docket No. 00-138**
Table of Allotments,	)	RM-9896
Digital Television Broadcast Stations.	)	
(Boca Raton, Florida)	)	

To: Chief, Video Division
Media Bureau

REPLY

1. Sherjan Broadcasting Co., Inc. ("Sherjan") filed a Petition for Reconsideration ("Petition") of the Report and Order ("Boca R&O") in the above-captioned proceeding on May 22, 2002. The School Board of Broward County and Guenter Marksteiner ("WPPB") filed a Joint Opposition on June 21, 2002. This is Sherjan's Reply to the Joint Opposition.

2. In the Petition, Sherjan demonstrated that the Boca R&O allotted DTV Channel *40 to Boca Raton was based on an erroneous reading of the Commission's Rules, and the Media Bureau's decision was contrary to an explicit prior decision of the full Commission, because the Boca R&O assumed that interference could be caused to 2% of the protected service area of Sherjan's Station WJAN-CA, while clearly established Commission policy permits interference to only 0.5%.

3. In its Opposition, WPPB argues that interference will not be caused to more than 0.5% of WJAN-CA's protected service area, but this calculation is based on a method of splitting "cells" that was never advanced by WPPB at any time in this proceeding until now and was not utilized, relied upon, or discussed in any way in the Boca R&O. It is too late to introduce a new method now. Accordingly, WPPB's argument may not be considered. The record shows that interference will be caused to 1.3% of WJAN-CA's protected service area; and on that basis, the allotment of Channel *40 must be rescinded.

4. The Commission's policy of not accepting new facts at the reconsideration stage, particularly where these facts are not newly available, is well-established. *See, e.g., Wickenburg, AZ*, 10 FCC Rcd. 1576 (par. 6) (MM Bur. 1995) (showing rejected where proponent "has not shown why these [facts] could not have been obtained earlier through the exercise of ordinary diligence...has not shown that the facts relied on relate to circumstances which have changed since the last opportunity to present them to the Commission"); *Caldwell, College Station and Gause*, Texas, 15 FCC Rcd. 3322, 3325 (par.10) (2000) (proponent "made no attempt to explain why this engineering submission could not have been provided earlier in the proceeding"); Farmington and Gallup, New Mexico, 14 FCC Rcd. 18983, 18985 (par. 8) (MM Bur. 1999) ("it appears [proponent] never raised these issues in any comments or reply comments in the proceeding").[1]

5. Petitioners must not be permitted endlessly to develop new arguments as it suits their convenience. The orderly conduct of the Commission's business requires that it rely on the established record in a rule making proceeding and that the new analysis provided by WPPB at this late stage be disregarded.

6. There is no basis for waiving the timeliness defect to ensure a more accurate result in the rule making. As shown by the attached Engineering Statement, the use of 1-km. cells in this case would allow WPPB to manipulate Bulletin OET69 methodology to produce the result it happens to advocate rather than improve the accuracy of the analysis, because the existence of a very large population in a census block (which is the case here) increases the potential for error.

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[1] *Cf. Garden City, Indiana*, 6 FCC Rcd. 3747, 2748 (par. 13) (MM Bur., 1991), where the Commission accepted late-filed facts because otherwise, the decision would be based on "incomplete or erroneous information," and "the possibility of manifest error" existed. In this case, there is no incomplete record, nor are does the original record contain erroneous facts. The original record was compiled in full accordance with the Commission's rules; so it is presumptively valid, and there is no "manifest error" involved. Indeed, reliance on the 1-km. cell size advocated by WPPB is likely to result in a less accurate, not a more accurate result. *See* par. 6, *infra*.

Moreover, the inherent accuracy limitations of the Longley-Rice propagation model on which Bulletin OET69 relies makes the use of a 2-km. cell size most appropriate. Finally, the Commission stated in the public notice cited in the Engineering Statement[2] that various analytical methodologies that may be used by applicants are expected to produce results consistent with Bulletin OET69, not to pry compliance out of an otherwise defective proposal.

7. For the foregoing reasons, the allotment of Channel *40 to Boca Raton must be rescinded as manifestly inconsistent with firmly established Commission policy. This result will protect the integrity of the Commission's spectrum management; and importantly, it will not leave WPPB without a digital channel, since that station already has a digital channel allotted to it.

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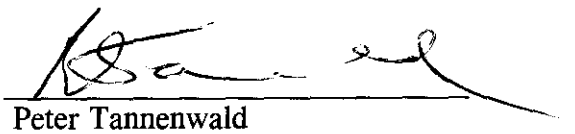
July 3, 2002

Respectfully submitted,



Peter Tannenwald

Counsel for Sherjan
Broadcasting Co., Inc.

[2] *Additional Application Processing guidelines for Digital Television ("DTV")*, released August 10, 1998.

ENGINEERING STATEMENT IN

SUPPORT OF REPLY TO

OPPOSITION TO PETITION

FOR RECONSIDERATION

MM DOCKET 00-138

WPPB-DT - BOCA RATON, FL

Sherjan Broadcasting Company, Inc.
Miami, FL

July 3, 2002

Prepared For: Mr. Omar Romay
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ENGINEERING AFFIDAVIT

State of Ohio)
) ss:
County of Summit)

Roy P. Stype, III, being duly sworn, deposes and states that he is a graduate Electrical Engineer, a qualified and experienced Communications Consulting Engineer whose works are a matter of record with the Federal Communications Commission and that he is a member of the Firm of "Carl E. Smith Consulting Engineers" located at 2324 North Cleveland-Massillon Road in the Township of Bath, County of Summit, State of Ohio, and that the Firm has been retained by the Sherjan Broadcasting Company, Inc., to prepare the attached "Engineering Statement In Support Of Reply To Opposition To Petition For Reconsideration - MM Docket 00-138 - WPPB-DT - Boca Raton, FL."

The deponent states that the Exhibit was prepared by him or under his direction and is true of his own knowledge, except as to statements made on information and belief and as to such statements, he believes them to be true.

Roy P. Stype, III

Subscribed and sworn to before me on **July 3, 2002.**

Nancy A. Adams
Notary Public

/SEAL/

NANCY A. ADAMS, Notary Public
Residence - Cuyahoga County
State Wide Jurisdiction, Ohio
My Commission Expires Sept. 5, 2006

ENGINEERING STATEMENT

This engineering statement is prepared on behalf of the Sherjan Broadcasting Company, Inc. ("Sherjan"), licensee of Class A TV Station WJAN-CA - Miami, Florida. It supports a response to an opposition to a petition for reconsideration filed on behalf of Sherjan against the *Report and Order* in MM Docket 00-138, which substituted DTV Channel 40 for DTV Channel 44 in Boca Raton, Florida for use by WPPB-DT.

The above referenced *Report and Order* acknowledged that the proposed Channel 40 DTV facilities for WPPB-DT would create new interference to 1.03% of the population presently predicted to receive 74 dBu interference free service from WJAN-CA, but proceeded to grant the proposed DTV channel substitution based on the faulty premise that the 2% de minimis interference standard outlined in Section 73.623 of the FCC Rules was applicable to this situation. As noted in Sherjan's petition for reconsideration, however, the applicable interference standard for Class A station protection is the 0.5% rounding tolerance applied when no de minimis interference is permitted.

In their joint opposition to the Sherjan petition for reconsideration, the licensee of WPPB-TV and Gunter Marksteiner ("WPPB") do not dispute that the 0.5% rounding tolerance is the correct interference standard to apply to this situation. Nor do they dispute the 1.03% interference figure cited by the FCC in the *Report and Order*. In fact, the engineering statement included as part of the WPPB opposition clearly concedes that the 1.03% interference figure is correct when a standard OET 69 analysis methodology is employed. Instead, the WPPB opposition attempts to artificially manipulate the OET 69 methodology to obtain a result which is to their liking by employing a 1 kilometer cell size, which they claim will reduce the predicted interference to 0.42%,

rather than the 2 kilometer cell size which is employed in a standard OET 69 analysis. As discussed below, however, the results obtained utilizing a 1 kilometer cell size are questionable, particularly when considered in light of the other accuracy limitations associated with the methodology employed in conducting an OET 69 interference evaluation.

The WPPB opposition notes that the majority of the interference predicted utilizing the standard 2 kilometer cell size is located in one particular cell which happens to have considerable population. This fact indicates that this interference is predicted to occur in an area of extremely high population density. In fact, an examination of census block data found that there are several census blocks in this area with large populations and population densities exceeding 10,000 persons per square kilometer. Since the methodology employed to determine population in an OET 69 analysis assumes that the entire population of a census block is located at its centroid, the potential for error is the greatest in cases where the population of a census block is large, since the entire population of a census block would be considered not to receive interference if its centroid fell in a cell not predicted to receive interference, even if a large portion of its population falls within an area predicted to receive interference.

There are also other factors which limit the accuracy of an OET 69 analysis, including the inherent accuracy limitations of the underlying Longley-Rice propagation model, errors associated with utilizing interpolated values from a digital terrain data base at 1 kilometer intervals to evaluate terrain shielding effects, and the inability to accurately replicate the vertical radiation pattern of each station considered in such an analysis. In light of these other inherent accuracy limitations, the FCC elected to estab-

lish a 2 kilometer cell size as an appropriate standard for such an analysis, apparently in an effort to establish a fairly uniform level of accuracy and precision throughout the entire process, while insuring that, if any errors occurred, they would not have the effect of resulting in interference to any station in excess of that predicted utilizing this methodology.

While it is true that both OET Bulletin 69 and the FCC's August 10, 1998 Public Notice entitled "Additional Application Processing Guidelines For Digital Television (DTV)" mention the possibility of employing a smaller cell size in an OET 69 analysis, it should be noted that OET Bulletin 69 specifically states that "Evaluations using cells smaller than 2 km on a side are also expected to be consistent with the evaluations given in Appendix B of the *Sixth Report and Order*." Based on this statement, it is obvious that the FCC did not envision the use of smaller cell sizes in situations such as this to attempt to reduce the predicted interference to a single highly populated area simply to bring an otherwise defective proposal into compliance with the applicable interference standard.

The WPPB opposition also claims that the FCC has previously granted numerous DTV proposals under the 2% de minimis interference criteria based on studies employing a 1 kilometer cell size. They have not submitted any citations, however, to support this claim. In particular, they have provided no examples of cases where a 1 kilometer cell size was successfully utilized to document compliance with the applicable interference standard when compliance could not be achieved utilizing the standard 2 kilometer cell size, especially in cases involving the stricter 0.5% rounding tolerance applicable here.

In summary, the attempt by WPPB to employ a 1 kilometer cell size to attempt to document that the proposed WPPB-DT facilities will comply with the 0.5% rounding tolerance interference standard to WJAN-CA constitutes no more than an attempt by WPPB to manipulate the OET 69 analysis methodology to achieve a result which is to their liking. There is no valid engineering basis for altering the analysis methodology in this manner in this situation, particularly when it results in a difference of nearly 2.5:1 in the amount of predicted interference to WJAN-CA.

CERTIFICATE OF SERVICE

I, Denise Branson, do hereby certify that I have, this 3rd day of July, 2002, caused to be sent by first class United States mail, postage prepaid, copies of the foregoing "Reply" to the following:

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/s/ Denise A. Branson
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